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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – PSD Major Modification to Add New Unit 3 at Intermountain Power Generating Station, Millard County, Utah Project Code: N0327-010 DAQE-AN0327010-04	:	SIERRA CLUB'S RESPONSE TO DEVELOPMENT COMMITTEE'S STATEMENT

The Utah Chapter of the Sierra Club ("Sierra Club") respectfully submits this response to the IPP Unit 3 Development Committee's ("Committee") Statement regarding the stipulated motion to continue the proceedings. The Sierra Club wishes to clarify that the Utah Air Quality Board's ("Board") regulations, and the Stipulated Motion, already provide a mechanism for lifting the stay, and that the Committee's request that the Board provide "any interested party" a mechanism for moving to lift the stay should be denied as inappropriate and, indeed, forbidden by the Board's regulations.

Utah Admin Code R307-103-6 describes "Parties and Intervention." This section of the Board's regulations provide, in relevant part (with emphasis added):

> (1) Determination of a Party. The following persons are parties to an adjudicative proceeding:
>
> (a) The person to whom an initial order or notice of violation is directed, such as a person who submitted a permit application that was approved or disapproved by initial order of the executive secretary;
>
> (b) The executive secretary of the board;

(c) All persons to whom the board has granted intervention under R307-103-6(2)

(2) Intervention.

(a) A Petition to Intervene shall meet the requirements of 63-46b-9 [which provides that "[a]ny person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding."]

(b) Any response to a Petition to Intervene shall be filed within 20 days of the date the Petition was filed, except as provided in R307-103-6(2)(c).

(3) Standing. No person may initiate or intervene in an agency action unless that person has standing. Standing shall be evaluated using applicable Utah case law.

At the same time, the relevant regulations plainly provide that matters of scheduling are the exclusive province of the parties to the matter:

(7) Schedules.

(a) The parties are encouraged to prepare a joint proposed schedule for discovery, for other pre- hearing proceedings, for the hearing, and for any post-hearing proceedings. If the parties cannot agree on a joint proposed schedule, any party may submit a proposed schedule to the presiding officer for consideration.

Five things are clear, based on these regulations: (1) the current parties to this proceeding are IPSC, the Executive Secretary, and the Sierra Club; (2) the Committee is not a party to these proceedings; (3) to become a party, the Committee must file a Petition to Intervene under these regulations, and demonstrate that it has standing; (4) other parties have 20 days to contest any motion to intervene; and (5) if and until it is a party to this proceeding, the Committee, as only an "interested party," can have no say in scheduling matters such as the lifting of a stay.

While there are no provisions whatsoever in the Board's regulations that allow a merely "interested" entity to file any scheduling motion with the Board in an adjudicative

proceeding, an interested entity may file a Petition to Intervene. The Committee must follow the Board's regulations, just as any other entity must, and first establish its standing to become a party to these proceedings. At this time, the Committee has not moved for intervention and has not supported the facts it alleges in its Statement by documentation or sworn affidavit.

If the Committee obtains party status, then – as provided in the Stipulated Motion of the Executive Secretary and Sierra Club – the Committee may consult with the remaining parties and, if possible, establish a joint proposed schedule, after which all the parties would move to lift the stay pursuant to the joint proposed schedule. Or, the Committee –only after it has become a party – may file its own, separate motion to lift the stay.

The Committee's Statement and the attached Notice of Claim for Damages describe the current significant conflicts between IPSC, which owns the Approval Order and is a party to this proceeding, and the Committee, which is not a party – including a dispute over whether IPA, which owns the land where Unit 3 is supposed to be sited, will in fact allow Unit 3 to be built on IPA's land. In light of the disputes described in the Committee's Statement, there are good reasons to think that at least one of the current parties – namely, IPSC – might well object to any motion by the Committee to intervene. Furthermore, the Unit 3 Approval Order is predicated on Unit 3 being a modification to existing Units 1 and 2.[1] There are also many other aspects of the permit application –

[1] Importantly, the Utah regulations in affect at the time the IPP permit was issued define "source" as "any structure, building, facility, or installation which emits or may emit any air pollutant subject to regulation under the Clean Air Act and which is located on one or more continuous or adjacent properties and which is under the control of the same person or persons under common control. Utah Admin. Code R307-101-2.

and resulting permitted emissions – that depend inextricably upon common control of Units 1 and 2 and the new Unit 3. The apparent divorce between IPA, which owns Units 1 and 2, and the Committee, which claims to be the real party in interest in Unit 3, throws into doubt the information on which the Approval Order is based.

The Committee is not a party to these proceedings, and the Board's regulations do not allow a non-party to make a scheduling motion to the Board. Instead, if the Committee seeks to participate in these proceedings, it must follow the procedures outlined in the Board's regulations. The Board should continue these proceedings as requested in the Stipulated Motion of the Executive Secretary and the Sierra Club, with further proceedings to be governed by the Board's regulations and agreement of the parties.

Dated: August 30, 2007

DAVID BECKER
JORO WALKER
Attorneys for Utah Chapter of the
Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2007, I caused a copy of the foregoing Sierra Club's Response to Development Committee's Statement to be emailed to:

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DAVID BECKER

ATTACHMENT A
UAMPS/PACIFICORP NOTICE OF INTENT TO SUE
July 18, 2007

July 18, 2007

VIA CERTIFIED MAIL

The City of Los Angeles
Attn: Office of the City Clerk
200 North Spring Street
Room 395, City Hall
Los Angeles, CA 90012

VIA CERTIFIED MAIL AND ELECTRONIC MAIL

Los Angeles Department of Water & Power
P.O. Box 51111, Room 342
Los Angeles, CA 90051-0100

Re: Claim for Damages

Dear Sir or Madam:

This letter shall serve as a Claim for Damages by the Utah Associated Municipal Power Systems, a Utah energy services interlocal entity and political subdivision of the State of Utah ("UAMPS"), and PacifiCorp Energy, a division of PacifiCorp, an Oregon corporation ("PacifiCorp") (collectively, the "Development Participants")[1] against the City of Los Angeles, a municipal corporation organized and existing under the Charter of the City of Los Angeles and the laws of the State of California, acting by and through its Department of Water and Power ("LADWP"), and Intermountain Power Agency, a Utah interlocal entity and political subdivision of the State of Utah ("IPA") (collectively "Defendants").

The claims and damages described herein arise in connection with the Defendants', including LADWP's, intentional disregard for and interference with the Development Participants' exclusive right to develop a third generating unit (hereafter, "Unit 3") at the Intermountain Power Project ("IPP") site, located within the State of Utah. This Claim for Damages relates to LADWP; the Development Participants have submitted a similar notice against IPA.

I. Notices. Each of the above named Development Participants is a "claimant", within the meaning of the Act. The address to which all notices pertaining to this Claim for Damages should be sent to is

For UAMPS:

UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS
ATTN: DOUG HUNTER
2825 East Cottonwood Parkway, #200
Salt Lake City, Utah 84121

[1] For purposes of this Claim for Damages, Development Participants means UAMPS (50%) and PacifiCorp (37%) only in regard to their individual interests in the Unit 3 development.

For PacifiCorp:

Nick Rahn
Vice President
PacifiCorp Energy
1407 W. North Temple, Suite 320
Salt Lake City, Utah 84116

II. Summary of Facts.

A. Background /IPP Agreements.

IPP is a power plant located in Millard County, Utah. IPP, as originally planned, included four coal-fired generating units, but only two of the generating units were built (referred to herein as "Units 1 and 2"). As a result, IPP includes the land, common facilities, water rights, feasibility studies, and other resources necessary to build additional generating units.

IPA was formed pursuant to the IPA Organization Agreement, dated May 1977. IPA members are comprised of 23 Utah Municipalities. IPP is solely owned by IPA. IPP therefore is solely owned by the 23 Utah municipal members of IPA.

In 1978 IPA adopted the Power Bond Resolution ("Bond Resolution"), pursuant to which IPA financed the construction of Units 1 and 2 through tax-exempt bonds. The principal and interest owed on those bonds are paid for pursuant to a series of substantially similar Power Sales Contracts IPA entered into with California Purchasers (i.e., California municipalities) and Utah Purchasers (i.e., Utah entities, including Utah municipalities) in 1978 and 1980. Section 707 of the Bond Resolution allows IPA to sell IPP facilities for the construction of additional units including, for example, common facilities to Unit 3 provided such sale does not adversely affect its ability to meet its bond payment obligations.

To build and operate Units 1 and 2, IPA entered into the Construction Management & Operating Agreement ("CM&OA") with LADWP in September 1980. Pursuant to the CM&OA, as then in effect and as has been amended, LADWP is appointed as the Project Manager (charged with building Units 1 and 2), and the Operating Manger (charged with operating and maintaining Units 1 and 2). IPA also entered into the Personnel Service Contract in June 1982 with the Intermountain Power Service Corporation ("IPSC"), a Utah non-profit corporation, to provide the Operating Agent with personnel to operate and maintain IPP on behalf of IPA.

The Power Sales Contracts provide for the formation of the IPP Coordinating Committee. The purpose of the IPP Coordinating Committee is to provide for coordination of the construction and operation of Units 1 and 2 between IPA, on the one hand, and the California Purchases (including LADWP) and the Utah Purchasers, on the other. Members of the IPP Coordinating Committee include representative(s) of IPA, the California Purchasers, and the Utah Purchasers. Section 36 of the Power Sales Contracts provides IPA may sell IPP facilities for the construction of additional units, including common facilities to Unit 3, provided that the IPP Coordinating Committee approves of such sale and that IPA receives

"fair value" for the Common Facilities. By resolution dated November 21, 2005, the IPP Coordinating Committee approved the sale of certain IPP common facilities for Unit 3.

Neither the IPA Organization Agreement, the Bond Resolution, the Power Sales Contracts, the Lay-off Power Purchase Contract, the Personnel Service Contract, nor the Excess Power Sales Agreement (collectively the "IPP Project Agreements"), provide LADWP or the California Purchasers with any right, title or interest to IPP or with the right to control or veto development of additional generating units at IPP, including Unit 3. The ownership of IPP is vested solely in IPA, and thus in 23 Utah municipalities.

B. Unit 3.

Sometime in or about 2000, the early development of Unit 3 began. Unit 3 has always been intended as a nominal 900 megawatt ("MW") coal-fired generating unit, similar in size and function to Units 1 and 2.

Pursuant to a resolution of the IPP Coordinating Committee under the Intermountain Power Project Unit Three Participation Agreement, a Steering Committee was formed for the purpose of, among other things, studying and analyzing the feasibility of constructing Unit 3. Steering Committee members included IPA, UAMPS, and LADWP.

The Steering Committee met regularly over a four year period and, upon completion of its work, disbanded in October 2004. Prior to the dissolution of the Steering Committee, LADWP withdrew as a participant in the Unit 3 project.

When the steering phase ended, the current participants in Unit 3, including UAMPS and PacifiCorp, entered into the Development Coordination Agreement, dated May 1, 2005, and the Development Agreement, dated May 1, 2005 (hereafter, the "Development Agreements"). LADWP is not a signatory to the Development Agreements and has no right under the Development Agreements to interfere with, or cause IPA or others to interfere with, the Development Participants' right to develop Unit 3 at IPP.

In March 2007, pursuant to the Development Agreements, the Development Participants provided IPA and LADWP with draft Unit 3 Project Agreements. Before finalizing those drafts, the Development Participants communicated that they did not intend for LADWP to be included as a signatory because IPA was the sole owner of IPP. IPA and LADWP, however, told the Development Participants that having LADWP as a signatory was necessary. The Development Participants, upon the advice of IPA and LADWP, then included LADWP as a signatory to the drafts, but the Development Participants continue to maintain that LADWP's signature is not required under either the Development Agreements, the IPP Project Agreements or otherwise.

Less than two weeks after sending the draft Unit 3 Project Agreements to IPA and LADWP, IPA and LADWP informed the Development Participants that neither IPA nor LADWP would negotiate or approve of the contracts. IPA, in a memorandum of March 21, 2007 to the IPA Board of Directors and the IPP Coordinating Committee members, stated:

> The sale of the Common Facilities to Unit 3 participants and other Unit 3 contracts must be approved by 80% of Coordinating Committee members. Several of the Unit 3 contracts must also be approved by Los Angeles City Council. IPA has been notified the California IPP Purchasers do not plan to

approve the contracts nor does the Los Angeles City Council plan to approve the required contracts. **The current desire of the California participants is to reserve the site and facilities to potentially be developed to meet carbon compliant clean coal projects for current IPP participants.**[2] The Unit 3 Development Participants have been informed of this situation.

(Emphasis added.)

Since the date of this memorandum, the Development Participants have made efforts to continue the development of Unit 3 as is their exclusive right under the Development Agreements. LADWP, however, has actively opposed and unlawfully interfered with the Development Participant's development efforts.

As a result of IPA and LADWP actions, the Development Participants have been damaged in an amount which exceeds more than $7 million which represents expenditures thus far in development costs.

Furthermore, pursuant to the Development Agreements, UAMPS, as a Development Participant, has entered into Unit 3 Power Sales Contracts for sale of Unit 3 capacity. Unlike Units 1 and 2, most of the capacity of Unit 3 will not be sold to California consumers. Any power that may be sold to California consumers will not violate the California GHG Law.

Under Section 301(1) of the Utah Interlocal Cooperation Act (the "Interlocal Act"), a project entity (i.e., IPA) must "offer to sell at least 50% of the generation output of or electric energy produced by the project" before undertaking the construction of facilities to provide additional project capacity. This output or energy can be in the form of long-term power sales agreements or an undivided ownership interest in the project. Subsection (2) of Section 301 provides that at least a majority of the generation capacity, generation output, or electrical energy production facilities providing additional project capacity must be made available to meet the "estimated electric requirements of entities or consumers within the state". The development and ownership arrangements for Unit 3 satisfy this and other requirements of the Interlocal Act. IPA's and LADWP's actions to block this development and ownership arrangement, therefore, are inconsistent with the Interlocal Act. Moreover, IPA's and LADWP's indicated intent to reserve the Unit 3 site, and the common facilities of Units 1 and 2, for the exclusive use of the California Purchasers violates the requirements of the Interlocal Act because that arrangement will not result in a majority of generation being used to meet the electric requirements with the state of Utah.

III. Claims.

The Development Participants have the exclusive right to develop Unit 3 at the IPP site. Neither LADWP, nor any California Purchaser (or their representative on the IPP Coordinating Committee), has a legal or lawful right to interfere with or divest the Development Participants of their exclusive right to develop Unit 3.

LADWP has no right, title, or interest in IPP or in additional generating units which may be built at IPP. LADWP is merely IPA's agent. Pursuant to the Bond Resolution, IPA—

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[2] California's Global Warming Solutions Act ("California GHG Law"), was enacted in late 2006. Under the California GHG Law, beginning as early as June 2007, all new California energy procurement must be from sources whose emissions are as clean or cleaner than natural gas power plants.

not LAWPD—has the right to determine whether or not to sell IPP facilities. And any approval needed by the IPP Coordinating Committee for the sale of IPP Common Facilities has already been given, by the IPP Coordinating Committee's adoption of its November 21, 2005, resolution, which identifies the Common Facilities to be sold and assigns a fair value to each. Furthermore, the California GHG Law, upon which LADWP relies to justify its unlawful interference with the Development Participants' exclusive right to develop Unit 3, has no application to Unit 3. LADWP therefore has no legal or factual basis to take the actions it has taken.

The claims the Development Participants intend to pursue against LADWP for its unlawful actions include, but are not necessarily limited to the following: (i) breach of the IPP Project Agreements; (ii) breach of implied contract; (iii) promissory estoppel for the Development Participants' reliance on LADWP's express and implied approval of the sale of IPP Common Facilities; (vi) tortious interference with the Development Participants' contractual rights; (v) violations the dormant commerce clause of the United States Constitution; and (vi) a declaratory judgment that any purported delegation by IPA to LADWP, any California Purchasers or the IPP Coordinating Committee to approve or block development of Unit 3 is outside the scope of authority grated IPA under the Interlocal Act and therefore is void.

IV. LADWP and Immunity. LADWP is not entitled to governmental immunity because LADWP's actions with regard to (i) IPP, generally, and (ii) Unit 3, specifically, are proprietary in nature and are not taken pursuant to any governmental duty or governmental authority. Nevertheless, the Development Participants submit this Claim for Damages to preserve their right to claim damages and to provide LADWP with an opportunity to resolve this matter.

V. Damages.

As a result of LADWP's unlawful and wrongful conduct, the Development Participants claim more than $7 million in development costs, as well compensatory and lost opportunity damages, in an amount in excess of $100 million, as will be adjusted upon further investigation, plus attorney fees and costs.

Respectfully submitted,

By: _____
Matthew F. McNulty, III
VAN COTT BAGLEY CORNWALL & McCARTHY
Attorneys for Utah Associated
Municipal Power Systems

By: _____
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